

Right of Control in Respect of Carriage of Goods by Sea

Candidate number: 8012

Supervisor: Research Fellow. Wang Yang

Prof. Thor Falkanger

Deadline for submission: 09/01/2006

Number of words: 14560 (max. 18.000)

Date of submission: 28/08/2006

Content

1 INTRODUCTION	错误！未定义书签。
2 THE SCOPE OF RIGHT OF CONTROL	5
2.1 WHAT IS RIGHT OF CONTROL FOR THE PURPOSE OF UNCITRAL DRAFT CONVENTION ON TRANSPORT LAW?	5
2.2 THE DEFINITION OF “RIGHT OF CONTROL”	5
2.2.1 SCOPE OF RIGHT OF CONTROL	6
2.2.2 THE ARTICLE 54 (A) “DO NOT CONSTITUTE A VARIATION OF THE CONTRACT OF CARRIAGE”	7
2.2.3 THE ARTICLE 54 (B) & (C) -RIGHT OF CONTROL VS. RIGHT OF STOPPAGE IN TRANSIT	8
2.2.3.1 Is ‘the right of control’ a superfluous stipulation?	8
2.2.4 IS THE RIGHT OF CONTROL A MANDATORY RULE?	13
3 DESIGNATION OF CONTROLLING PARTY, CONTROLLING PARTY’S EXERCISE OF RIGHT OF CONTROL AND TRANSFER OF THE RIGHT OF CONTROL	15
3.1 WHEN NO NEGOTIABLE TRANSPORT DOCUMENT OR NO NEGOTIABLE ELECTRONIC TRANSPORT RECORD IS ISSUED	15
3.1.1 WHO IS THE CONTROLLING PARTY?	15
3.1.1.1 Rationale for shipper to be prima facie controlling party	15
3.1.1.2 Does the designation of a new controlling party need the consent of the consignee?	16
3.1.1.3 When is the consignee the controlling party?	18
3.1.2 PROPER IDENTIFICATION NEEDED FOR EXERCISING RIGHT OF CONTROL	18
3.1.3 RULE FOR TRANSFER OF RIGHT OF CONTROL	19
3.1.4 LIMITS TO EXERCISE RIGHT OF CONTROL	19
3.1.4.1 Terms of contract between shipper and carrier	19

3.1.4.2 Period for exercise the right of control	19
3.1.4.3 Acquisition of rights by consignee	20
3.2 WHEN NEGOTIABLE TRANSPORT DOCUMENTS ARE ISSUED	21
3.2.1 WHO IS THE CONTROLLING PARTY IN CASE OF A NEGOTIABLE TRANSPORT DOCUMENT IS ISSUED?	21
3.2.1.1 Holder of negotiable transport document	21
3.2.1.2 Shipper and seller not to be the same person	22
3.2.1.3 Charterer and shipper not to be same person	22
3.2.1.4 Solutions to the conflicts where the carrier will not wish to resolve them in favor of either in case it is liable to the other	23
3.2.1.5 The holder of all originals to be the sole controlling party	23
3.2.2 TRANSFER OF RIGHT OF CONTROL IN CASE OF NEGOTIABLE TRANSPORT DOCUMENT ISSUED	24
3.2.2.1 Negotiable transport document as transfer mechanism	24
3.2.2.2 Transferor to lose right of control upon transfer of document	24
3.2.2.3 All originals to be needed for transfer of right of control	25
3.2.2.4 Requirement for exercise right of control in case of a negotiable transport document is issued	25
3.3 THE APPLICABLE RULES WHEN A NEGOTIABLE ELECTRONIC TRANSPORT RECORDS IS ISSUED	25
3.4 THE PROTECTION OF “INTERMEDIATE HOLDER”	26
<u>4 CARRIER’S EXECUTION OF INSTRUCTION</u>	<u>27</u>
4.1 CONDITIONS FOR THE EXECUTION OF INSTRUCTIONS	27
4.1.1 VARIANT A OF PARAGRAPH1, INCLUDING PARA.1 <i>BIS</i>	27
4.1.1.1 Instructions needed to be executed in Variant A	27
4.1.1.2 Comments on Variant A	29
4.1.2 VARIANT B OF ARTICLE 57.1	30
4.1.2.1 The instructions which carrier is bound to execute	30
4.1.2.2 Comments on Variant B	32
4.2 CONSEQUENCES OF CARRIER’S FAILURE TO COMPLY WITH NEW INSTRUCTIONS FROM CONTROLLING PARTY	32
4.2.1 DOES THE ARTICLE 57.4 ADD EXTRA BURDEN ON THE CARRIER?	32
4.2.2 BASIS OF LIABILITY	33
4.2.3 CAN THE CARRIER RELY ON THE ARTICLE 57.1 TO DEFEND ITS FAILURE TO EXECUTE THE INSTRUCTION?	34

4.3 DEEMED DELIVERY UPON WHICH CARRIER DISCHARGES HIS OBLIGATION	34
<u>5 THE CONTROLLING PARTY'S OBLIGATIONS AND LIABILITIES</u>	<u>35</u>
5.1 THE CONTROLLING PARTY'S BASIC OBLIGATIONS AND LIABILITIES	35
5.1.1 "REIMBURSEMENT OBLIGATION" PROVIDED FOR IN THE ARTICLE 57.2	36
5.1.2 CONTROLLING PARTY'S OBLIGATION TO PROVIDE A SECURITY IN THE ARTICLE 57.3	36
5.1.3 CONTROLLING PARTY'S OBLIGATION AND LIABILITIES TO PROVIDE INFORMATION, INSTRUCTIONS OR DOCUMENTS TO CARRIER ACCORDING TO THE ARTICLE 59	37
5.1.3.1 To what extent a relative information is "adequate"?	37
5.2 THE CONTROLLING PARTY'S EXTRA OBLIGATIONS AND LIABILITIES WHEN THE CARGO IS UNDELIVERABLE	38
5.2.1 THE CONTROLLING PARTY'S EXTRA OBLIGATIONS WHEN NO NEGOTIABLE TRANSPORT DOCUMENT OR NEGOTIABLE ELECTRONIC TRANSPORT RECORD ISSUED	38
5.2.2 THE CONTROLLING PARTY'S EXTRA OBLIGATIONS WHEN NEGOTIABLE TRANSPORT OR NEGOTIABLE ELECTRONIC TRANSPORT RECORD IS ISSUED	39
5.2.3 THE LEGAL CONSEQUENCES IN CASE OF THE CONTROLLING PARTY FAIL TO GIVE ADEQUATE INSTRUCTION ON DELIVERY	40
<u>6 CONCLUSION</u>	<u>42</u>
<u>REFERENCES</u>	<u>43</u>
LIST OF JUDGEMENTS/DECISIONS	43
SECONDARY LITERATURE	43

1 Introduction

Background

The concept “right of control” virtually has been widely used in other transport modes than carriage of goods by sea. It has been regulated, for example, in Warsaw and Montreal convention on air transportation, COTIF-CIM convention¹ on rail transportation and CMR convention² on road transportation, whereas this subject has never been dealt with in maritime conventions.³ Features of the modes results in the development of the documentary rules applicable for the transport documents towards various directions.

Compared with other transport practice, goods carried by sea are often resold many times before its arrival at the destination. In order to cater for this characteristic of maritime transport, a bill of lading system has been developed which helps the traders to transfer the property rights in goods. A traditional bill of lading representing the goods then gives a constructive possession of the goods to its holder. By presenting the bill to the carrier, the holder can demand delivery of goods from the latter. The transfer of the bill means the transfer of the constructive possession of goods. Thus who has the possession of the bill actually has the control of the goods.

With the overwhelming improvement of the shipping industry and consequent shortening of the time used for each voyage, the use of bills of lading in many trades is rapidly decreasing or has entirely disappeared. Instead sea waybills or other non-negotiable⁴ transport documents are more and more appreciated especially where there is no requirement for financing security. Besides, the multimodal transport documents used in the container logistic and multimodal transport can hardly fit in with the concept of traditional bill of lading so as to provide a document of title function⁵, which means a document relating to goods the transfer of which

¹ Convention concerning International carriage by rail (9 May 1980)

² See further art.12 of Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956).

³ Adopt contractual approach for its scope of application; it does not deal with the documentary rules.]

⁴ [To be further developed, see H.G TREITEL *Carver on Bill of Lading*, (Chapter 6 Document of title)

⁵ [See H.G.TREITEL, *Carver on Bill of Lading*, (Chapter 6 Document of title, P6-001); GOODE, *Legal Ownership*;

operate as a transfer of the constructive possession of the goods, and may operate as a transfer of the property in them.⁶ Furthermore, e-commerce systems⁷ have also a swift tendency with utilization in the maritime transport. The characteristics of these transport documents⁸ distinguish from each other (e.g. negotiable or non-negotiable, documentary or electronic), yet they are endowed with (or at least related with), by agreement or by statute, one common and significant feature—the control of goods⁹. Normally the control of goods in transit includes:

- (a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;
- (b) The right to demand delivery of the goods before their arrival at the place of destination; and
- (c) The right to replace the consignee by any other person.

Although there are rules peculiar to the use of certain transport document, the aspect of right of control, which is given by the document to the parties interested in the contract of carriage, has not been paid much attention on in the maritime law context.¹⁰ There are no uniform rules on this subject on an international scale. Consequently, practices on this point diverge very much in different jurisdictions. Furthermore, the existent rules on right of control for certain documents often cannot provide clear guidance on problems associated with the distribution of right of control and the liability of the carrier in relation to the execution of instruction of the party who has the right of control. Cases in this respect can be found in both England and China. Take the sea waybill for instance, one of the merit of sea waybill that the shipper can, at any time before delivery, direct the carrier to deliver the goods to a person other than the named consignee. The carrier would, *prima facie*, be obliged to comply with this order since normally the contract

E.P.ELLINGER, *Benjamin's sale of goods*, (Sweet & Maxwell: London 2002)]

⁶ See, the references to “symbolical” and “constructive” delivery in *Sanders Bros V. Maclean & Co.*(1983)11 Q.B.D.327 at 341, *E.Clemens Horst Co.v.Biddell Bros* [1911]1.K.B.934 at 957,per Kennedy L.J., whose dissenting judgement was upheld on appeal[1912]A.C.18.

⁷ See e.g. Bolero e-commerce system; [adding other e-commerce systems].

⁸ Strictly speaking, electronic equivalents cannot be regard as documents. The information on it is carried by a totally different medium.

⁹ See e.g. the document of title function of the bill of lading provides the holder a key to warehouse to unlock goods (see judgment of Bowen L.J in *Sanders vs Maclean*. [1883] 11 Q.B.D.327,341); in the case of sea waybill issued, normally the shipper is the controlling party with option to transfer the right of control to the consignee when noted on the sea waybill (See further art.6 of CMI Uniform rule for seaway bill; according to art.7 of CMI Rules for electronic bills of lading the holder of electronic document is the Controlling party, with option to transfer to other parties under some conditions.

¹⁰It is probably because “Practices that have developed under the bill of lading system may have been the reason that in the past no urgent need was felt.”

would be construed as one to deliver to the named consignee or to such other person as the shipper might direct.¹¹ There is then a conflict which needs to be resolved. On the one hand, the shipper wishes to retain his rights of disposal at any time before delivery. On the other hand, the named consignee wants delivery made to him in accordance with the carrier's undertaking. The carrier will not wish to resolve the conflict in favor of either in case he is liable to the other.¹² Neither the existing conventions on carriage by air, road and rail provide clear guidance on this problem¹³, nor do the CMI rules¹⁴. The above reasons constitute the primary rationale for the thesis, "Right of Control".

Upon the call for a comprehensive solution on the subject "right of control", the recent UNCITRAL draft convention¹⁵ on transport law¹⁶ has provided a set of brand new rules for this subject. Chapter 11 concerns the concept of right of control and the transfer of the rights. Can it provide a proper normative predictability for all the traders interested in a contract of carriage? Can it provide sufficient guidance for the problems which already exist? Does it facilitate a fair weighting of the diverse interests involved? Is it sufficiently clear? Is it applied consistently? Are there significant gaps? Can it fit in with the future documentary development? All these factors underline the need for this thesis.

Purpose of study and focuses

This thesis attempts to examine the proposition of the 'right of control' under the UNCITRAL draft convention. It seeks to resolve the question that how the right of control of goods carried by sea should be regulated. Discussion will focus on the following questions of 1) what is the right of control, 2) who has the right of control, 3) how is the right of control transferred from

¹¹ The same result would follow if a bill of lading were issued and had not been transferred: see Benjamin, para 1438; *Mitchell vs Ede* (1840) 11 Ad&El.888; *The lycaon* [1983] 2 Lloyd's Rep 548, though not where the bill of lading had been transferred: Debattista, op cit, pp32-33, 195-198.

¹² See The Law commission and The Scottish law commission Report on "Rights of suit in respect of carriage of goods by sea" (Law Com No.196) (Scot Law Com No.130), P.43.

¹³ The UN Convention on the Carriage of Goods by Sea 1978 (The Hamburg Rules) does not deal with the problem of rights of disposal where non-negotiable documents are used.

¹⁴ CMI Uniform rule for sea waybill, <<http://www.cmi.org>> (last accessed 18 March 2006)

¹⁵ In 1999, the CMI started work on drafting a new convention on sea carriage. The CMI's draft outline instrument was completed in early 2001 and remitted to working group III of UNCITRAL for further development. This draft convention is a successor of draft instrument, and attempts to confront all of the areas of transport law where international uniformity was lacking.

¹⁶ UNCITRAL (i.e. United Nations Commission on International Trade Law). This draft convention is still under processing, which stands a very good chance of success being a substitute of current international conventions on carriage of goods by sea. Its context up to date is in UN Document A/CN.9/WG.III/WP.56, and other related materials are available at the web page: <<http://www.uncitral.org>> (last accessed on 18 Mar. 2006).

one to another, 4) carrier's execution of instruction, 5) Obligations and liabilities of the controlling party. Concluding remarks concern the direction of legal development for the treatment of the right of control shipped by sea.

Methodology

The subject involves primarily legal research and scholarship. Most of the subject involves examination of relevant provisions in the draft convention. It will also focus on the convention's other modes of transportation, international instruments on transport document, national legislation, and private electronic systems for EDI(i.e. electronic data interchange). Examination of these will have two main prongs:

Analysis of law as it is (*de lege lata*) and analysis of law as it ought to be (*de lege ferenda*). The analysis will involve application of traditional legal dogmatic methods for ascertaining the legally valid scope and content of the rules concerned.

Focus will primarily be directed at relevant legislations and/or authorities in Norway, because Norway is particularly interesting because of its contribution to the subject of right of control in the drafting of the UNCITRAL rules. As the one of the delegates of the UNCITRAL Working Group III on transport, its task is mainly focus on the subject "right of control".

Sources

The analysis is based on the present context of the draft convention in the UN Document A/CN.9/WG.III/WP.56. Necessary indications of the sources of those provisions are made in this paper at the footnotes.

2 The scope of right of control

2.1 What is right of control for the purpose of UNCITRAL draft convention on transport law?

As aforementioned in chapter 1, no rules regarding right of control has been regulated in current principal international conventions under carriage of goods by sea, such as Hague-Visby Rules and Hamburg Rules. The mainly reason is high risk the carrier had to bear during the custody of carriage in the past, which therefore needs more protection. Moreover, the unsophisticated communication technology was another reason to limit the cargo interests to control the goods during carriage.

In recent years the overall situations has been further complicated by the fact that the advanced activities used in maritime transport to reduce risk, and improved wireless communication applied to facilitate people connect in long distance. The carrier's position is not as weak as before, for the aim of balancing rights and obligations, it is necessary to endow some rights to the counterparty in carriage contract. Hence, right of control has been added in draft with respect to above background. In the following pages each of rules regarding right of control will be considered separately and some comparison will be analyzed between similar terminologies, as well as taking consideration of whether the rules of right of control is mandatory or not.

2.2 The definition of "right of control"

According to the article 54 of the Convention, right of control is the right under the contract of carriage to give the carrier instructions in respect of the goods during the period of its responsibility¹⁷. It includes¹⁸:

- a. The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

¹⁷ See the article 11(1) of UN Document A/CN.9/WG.III/56.

¹⁸ See the article 56 of UN Document A/CN.9/WG.III/56.

- b. The right to demand delivery of the goods [before their arrival at the place of destination] [at an intermediate port or place en route]¹⁹.
- c. The right to replace the consignee by any other person including the controlling party.

These instructions are typically needed under the contract of carriage by the person who is in control of the goods during their transport under a contract of carriage. The key point of article 56(a) is that the new instructions can not be constituted to a variation of contract. If so, a new carriage contract should be made instead of the old one. Examples of these are the instruction to carry the goods at a certain temperature or to deliver them at a certain point of time at the premises of the person who has the right of control. Oppositely, a request to split a consignment during its carriage and to deliver the parts of it to different persons may vary the root of the contract of carriage itself.

The “delivery of the goods before their arrival at the place of destination” in the article 54 (b) is the translation of the right to stop the goods in transit into transport law terms. The instruction under 54 (c) to replace the consignee means that the stopped goods can be delivered to another person than the original consignee. It may be expected that these two instructions will be used in conjunction. Taken together, they form the minimum requirement for the execution under the contract of carriage of the control of the goods that may exist under the sales contract. Under the circumstances, it may be desirable to add further instructions, such as to temporarily store the goods (in an intermediate port or at the place of destination) or to return the goods to the place of their origin.

2.2.1 Scope of right of control

In the other transport conventions such as Warsaw and Montreal convention on air transportation, COTIF-CIM convention on rail transportation and CMR convention on road transportation, all of those conventions adopts substantially similar technique of right of disposal²⁰ or similar²¹ in non-negotiable transport document. Take CMR for example, in CMR the sender is the party who makes the initial contract of carriage, the equivalent of the ‘shipper’ under a contract of carriage by sea, who has the right to disposal of the goods.

¹⁹ See footnote 184 of A/CN.9/WG.III/56, and will be analyzed afterwards.

²⁰ See further in the article 12(1) in CMR, the article 18 in COTIF-CIM, the article 12 in WARSAW

²¹ Right of disposition of cargo, see further in the article 12(1) in MONTERAL

Compared with those other rules, the scope of right of control in the draft convention is wider. First of all, the scope of application is wider. The draft convention is called draft convention on transport law. From the title, it does not deal with maritime transport issues in particular. According to the definition of its scope of application²² combined with the definition of the contract of carriage²³ the draft convention will apply whenever a sea leg is involved.

Secondly, the draft convention intended to cover not only non-negotiable transport document, but cover negotiable transport document and electronic transport document. However, in other international regulations, such as the Uniform Rule for Sea Waybill by CMI in 1990, the right of control is only applied in carriage under Sea waybill and electronic transport document.

Thirdly, it can be seen from the article 54 that all of the three aspects are those rights belonging to the person who has right of control under the contract of carriage. But in the Article 6 of Uniform Rules for Sea waybills by CMI in 1990, the terminology of right of control is defined as a right endowed a shipper only to “give the carrier instructions in relation to the contract of carriage”²⁴ and “change the name of the consignee at any time up to the consignee claiming delivery of the goods after their arrival at destination”²⁵

2.2.2 The article 54 (a) “Do not constitute a variation of the contract of carriage”²⁶

“Do not constitute a variation of the contract of carriage” is a distinct characteristic of the right of control defined in para (a). Accordingly, the instruction given by the controlling party²⁷ can not be out of the carriage contract, namely not changing substantive clause or contractual relationship. Otherwise, the instruction would be invalid. The carrier is entitled to reject to execute the instruction when it can be deemed as constitution of varying the contract of carriage between the shipper and the carrier. Such as carry the goods at a certain temperature²⁸ is a normal instruction within the scope of contract of carriage, but changing the place of delivery not en route would constitute a variation of the carriage contract.

²² The rules of scope of application are mainly regulated in chapter 3 in UN Document A/CN.9/WG.III/WP56.

²³ See the article 1 (a) in UN Document A/CN.9/WG.III/WP56: the contract must provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

²⁴ CMI Uniform rule for sea waybill, <<http://www.cmi.org>> (last accessed 20 June 2006)

²⁵ CMI Uniform rule for sea waybill, <<http://www.cmi.org>> (last accessed 20 June 2006)

²⁶ The original text is: a right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage.

²⁷ See article 1 (m) of draft convention in UN Document A/CN.9/WG.III/WP56.

²⁸ See further in para186 of UN Document A/CN.9/WG.III/WP21.

Therefore, it is necessary to make a clear distinction in substance between ‘normal’ instructions given in respect of the goods and more substantive variation of the contract of carriage.

When the instruction in respect of the goods constitutes a variation, the art 55(2) is triggered to apply. This rule, known as the prerequisite of effectiveness of the variation provided for in the article 54 (a), is of great importance. It means that the instruction which varied the contract could be lawfully executed only when the variation had been stated in the negotiable transport document or incorporated in the negotiable electronic transport document.

However, in my opinion, the borderline of the variation in the article 54(a) is quite vague, which could make difficulties in practice. One of the negative effects it could bring about is to impose extra burden on carriers: ought they to obey the vague instruction from the person who has the right of control? Can the carrier reject the instruction given by the controlling party when he thought it may lead to a variation of the contract? It is better to give more detail guidance with respect to the instructions.

2.2.3 The article 54 (b) & (c) -Right of control vs. Right of stoppage in transit

2.2.3.1 Is ‘the right of control’ a superfluous stipulation?

One of the main functions of the article 54(b) and (c) is to provide an unpaid seller the mechanism that he “may have retained title to the goods or may wish to exercise a right of stoppage under its contract of sale”²⁹.

“Right of stoppage in transit” is a term from English law. The section 44 of the Sale of Goods Act 1979 provides for that “when the buyer of goods becomes insolvent the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price”³⁰.

Apparently, the article 54 (b) is almost the translation of the right of stoppage in transit into transport law terms. Indeed, there are some common features between the two types of rights.

Firstly, both of them must be exercised under the contract of carriage. Normally the stoppage in transit is a right endowed by the sale contract, but it is a right to send an instruction

²⁹ See further in A/CN.9/WG.III/WP.21, para186

³⁰ This doctrine was accepted by *Lickbarrow v. Mason* (1793), 6 East, n.H.L.; 1 Smith L.C.(13th ed), para.703.

from the unpaid seller to the carrier to stop delivering goods to the consignee or the holder of the bill of lading.

Secondly, the duration of them is almost the same, i.e. both rights can be exercised until the buyer or his agent, on his behalf, takes delivery of goods from the carrier.

Thirdly, the carrier is the obligor of the two kinds of rights. It must obey the instructions from the persons who have them, i.e. the unpaid seller under the contract of sale and the controlling party under the contract of carriage of goods.

Similar as these rights may be, they differentiate from the following two aspects:

(1) The functions of the two rights are different

So far as the legislative purpose is concerned, the right of stoppage is to “enable the unpaid seller, by resuming his lien, to gain priority (in regard to the goods) over the general creditors of an insolvent buyer who becomes bankrupt”³¹. By stopping the goods in the course of their transit, the seller puts the carrier under an obligation to redeliver the goods to him, and thereby reacquires the right to possession of the goods. The unpaid seller’s right of stoppage in transit arises solely upon the buyer’s insolvency, partial payment of the price does not prevent the seller from exercising the right of stoppage in regard to the balance of the price, nor does his acceptance of a negotiable draft convention as conditional payment.

The right of control for the purpose of the draft convention is designated, in addition to being as the counterpart under transport law facilitating the seller to utilize the stoppage in transit, to provide solutions to some legal problems as follows:

First of all, it is intended to ‘enable the seller to prevent the goods from arriving in the jurisdiction of the consignee.’³² The reason is that contracts of carriage of goods by sea frequently involved an international dimension, either because the parties involved are resident in different countries or because performance of the contract is required in a state other than that in which it was concluded. In the event of any dispute arising from such a contract, problems may ensue as to court or arbitration in which proceedings can be instituted and as to the appropriated law which is applicable to the transaction. However, the *lex fori* is difficult to determine since both parties have not chosen the governing law. If the governing law and forum are not in the seller’s home state, the unpaid seller would bear high risk of losing due to lack of familiarity of substantive and procedure law in jurisdiction state. Hence, the holder of right of

³¹ See Benjamin, para 15-062

control can execute right of control to instruct carrier to stop delivering or change route to another destination, when the holder of right of control stands a weak position in respect of jurisdiction.

Moreover, rules of right of control are able to solve the problem of delivery of goods without production of bills of lading, especially problem regarding the instruction from the charterer of the vessel.

The concept of delivery is relevant in the factual context, in order to see exactly when it occurs, and in a legal context to denote the discharge of the carrier's obligations under the contract of carriage³³. Generally, if a bill of lading is issued, only a holder of the bill can demand delivery of the goods at the port of discharge. A bill of lading is not only a potential contract for the carriage of goods, it is also a negotiable receipt for the cargo i.e. a document of title. Once the master has signed a bill of lading and parted with it, it has subjected the carrier to a contractual obligation, enforceable at the suit of any person to whom the bill of lading has been negotiated, to deliver the cargo to that person.³⁴ Thus, delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession. And if the carrier delivered the goods, without production of the bill of lading to a person who is not entitled to them, it is liable to the true owner of the goods in tort (or conversion³⁵). In such a case, the carrier is liable of the full value of the cargo wrongly delivered.

The requirement that delivery be made only against production of an original bill of lading is not generally a problem so long as it reaches the receiver before the goods arrive at their destination. However, in nowadays practice frequently the bill of lading is not available when the goods arrive at their destination. This may be caused by all kinds of business reasons, such as the credit term of the financing arrangements in respect of the goods being longer than the voyage, or it may be the result of remoteness of the place of destination or bureaucratic³⁶. Consequently, a serious problem for shipowner cropped up in modern shipping namely the

³² See Para 186 in UN Document A/CN.9/WGIII/WP.21

³³ See Gaskell, *Bill of Lading: Law and Contracts* (2000), P448.

³⁴ Per Millett L.J. in *Kuwait Petroleum Corporation v. I&D Oil Carriers Ltd. (The Houda)* [1994] 2 Lloyd's Rep.541, (C.A.); reversing [1993] 1 Lloyd's Rep.333.

³⁵ *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.* [1959] A.C.576. 'Conversion', a terminology of tort & criminal law in common law system. According to the interpretation in *Salmond on the Law of Torts* 94, there are three distinct methods by which one man may deprive another of his property, and so be guilty of a conversion and liable in an action for trover—(1) by wrongly taking it, (2) by wrongly detaining it, and (3) by wrongly disposing it.

³⁶ See. UN Document A/CN.9/WGIII/WP.21,p.51.

request by charterers for delivery of cargo without presentation of original bills of lading. Often specific clauses may be found in charter parties which oblige the shipowner to deliver the cargo regardless of whether or not the original bill of lading has arrived at the discharging port and has been presented to the vessel. To take an example in a voyage charter:

‘Should bills of lading not arrive at discharging port in time then Owners should release the entire cargo without presentation of the original bill of lading. Charterers hereby indemnify owners against all consequences of discharging cargo without presentation of original bill of lading’.

Under a voyage or time charter party, if the bill of lading is made out in the name of the charterers or their order, then unless and until it has been negotiated the charter party represents the only contract for the carriage of the cargo. The risk to the master lies in the fact that, unless the bill of lading is produced to him, he cannot know whether it has been negotiated or not. Once he has complied with the charterer’s instructions to sign and deliver a negotiable bill of lading, he renders the carrier potentially liable to any person to whom the bill of lading has been negotiated, and cannot safely deliver the goods to anyone, including the charterers themselves, unless the bill of lading is produced to him. A carrier that takes the instruction of the charter and delivers cargo without production of a bill of lading actually is in a breach of a bill of lading contract. This was the view taken in an English case *Kuwait Petroleum Corporation v. I&D Oil Carriers Ltd. (The Houda)*.³⁷ This case restated the previous position that nobody, not even the time charterer, has the right to order the master to deliver the cargo without surrender of an original bill of lading.

It follows that if a bill of lading is negotiable then the original must be produced to obtain delivery. The rule in *The Houda* preserves the security due to the negotiability of a bill of lading so that it protects a lawful holder who may have paid for the goods or may have provided finance for the goods in exchange for a pledge on the document, but it does relieve the carrier from the risk of giving delivery in the full knowledge that he is subsequently liable to the rightful owner of the goods and/or holders of the bill of lading if the cargo has been delivered to the wrong person.

There are some balanced rules under draft convention in respect of above question. Taking into account the current practice which deviates too much from the rule laid down in

³⁷ [1994] 2 Lloyd’s Rep 541.

The Houda to make it obligatory, the draft convention does not impose a duty on the carrier to deliver the goods only against surrender of the document. Whether the carrier should observe the strict presentation rule depends on the circumstances of the case. Paragraph.a (i) of Art.49³⁸ provides that, if a holder claims delivery, the carrier is obliged to deliver against the presentation of the transport document and, consequently, must be held discharged from its obligation under the contract of carriage to deliver the goods at the place of their destination, however it does not exclude possibility that a person other than the holder is entitled to claim delivery. According to the article 49 (b), where a holder does not make use of its right to obtain delivery of the goods the most possible situation would be that the ultimate receiver cannot obtain delivery because the document has not found its way into the receiver's hands, the proper functioning of the bill of lading system is at stake.³⁹ "Parties may elect to follow a more risky course. In such a case, the carrier must first seek instructions from any of the controlling party or shipper, who are obliged to give the carrier proper instructions. If they fail to do so, they might be held liable for not giving the carrier proper instruction to dispose of goods, unless a valid 'cesser clause' has released any of them from this obligation."⁴⁰

Last but not least, rules of right of control as well are able to solve the problem that no one is responsible for the charges of the goods which arrive at the destination without a person to collect them in time. The article 48⁴¹ in draft convention provides that, the responsibility for the delivery will rest on the shipper or controlling party, if the consignee does not show up at the place of destination or otherwise claims to take delivery of the goods.

(2) Who is entitled to exercise the right?

The right of stoppage in transit belongs to the seller in his capacity as seller of the goods: it does not depend on his having previously enjoyed the right of lien over the goods, since it is not a revival of that lien.⁴² Usually, the seller's agent also may exercise the right of stoppage on his behalf.

According to the article 56, in case of no negotiable transport document issued, controlling party could be the shipper in most cases but the consignee may entitle to exercise the right if

³⁸ See the article 49 of UN Document A/CN.9/WG.III/WP.56.

³⁹ See UN Document A/CN.9/WG.III/WP.21, para.173, p.56

⁴⁰ *Ibid*, para 174, P.56.

⁴¹ See the article 48 of UN Document A/CN.9/WG.III.56.

⁴² Nor does a right of stoppage belong to other person (i.e. other than a seller) who previously had a lien over the

there is an agreement between them. The shipper and the consignee can even ‘agree that another person is to be the controlling party.’⁴³ In the circumstance of negotiable transport document (including the negotiable electronic transport record) “the holder of all originals is the sole controlling party.”⁴⁴

The right of stoppage in transit, in spite of being accepted by most of international conventions and national laws, there are some differences since it based on different grounds or situations. For example, it regulates “the right of stoppage can not be asserted against a third party who has acquired an order or bearer bill of lading in good faith”⁴⁵ under Norwegian maritime code. However, no similar rules have been regulated in the Sale of Goods Act 1979. The conflict between Norwegian legislation and the Sale of Goods Act made obstacles to exercise of right of stoppage in transit. Harmonize different laws and seek to uniformity is one of purposes purchased by draft convention, and the uniform rules of right of control will be trigger to apply.

Consequently, from above reasons, the regulation of right of control is necessary in the draft convention concerned with transport law.

2.2.4 Is the right of control a mandatory rule?

Everything expressed in previous chapters is based on the hypothesis that the right of control has been endowed to the controlling party. But, is it mandatory which can not be derogated by freedom of contract? Regulation tool place in a nation that has always prided itself with applying the principle of the free market, of course, there is not true in specific areas such as consumer protection, product liability and medical malpractice, but in pure business, relations, including contracts, the free market and non-interference by government would be a value.

In any case, looking at shipping world-wide is different today than before. The criticism of mandatory legislation not going far enough in protecting cargo interests is connected with the hypothesis that the same values that have existed at least since the 1920’s are accepted.: to protect the potentially weaker party in the contract for the carriage of goods by sea, e.g. the cargo interests. Normally, the person interested in goods has the right of control, which means, the controlling party generally stands in a weaker position in the contract of carriage.

goods, e.g. a repairer. See Benjamin, para15-065

⁴³ See the article 56.1(a) of UN Document A/CN.9/WGIII.56

⁴⁴ See the article 56.2(a) and 56.3(a) of UN Document A/CN.9/WGIII.56

⁴⁵ See para 2 in the section 307 of Norwegian maritime code.

In addition, one essential starting point would in my opinion insist on mandatory legislation be the notion of loss avoidance. It is a common goal for all interests concerned: shippers, carriers, insurers etc, and one of aims to endow right of control is facilitating controlling party (normally the cargo interests) control the process of cargo carriage, give instruction to avoid potential loss when situation differed.

Further, as sea carriage is regulated upon on a truly global basis, development phases in different states vary bringing along different levels of both commercial and legal skills in order to regulate positions in a contractual relation. There might be a need to create legislative specifications on such basis.

3 Designation of Controlling Party, Controlling party's exercise of right of control and transfer of Right of Control

The article 1(m) of the draft convention states that the controlling party is the person who is entitled to exercise the right of control. However, this article only deals with the definition issue. The article 55.1 emphasizes the exclusivity of the position of the controlling party. Who is the controlling party that has the right as such is actually provided for in the article 56 of the draft convention. The article 56 also lays down the rule for the controlling party's exercise of the right and the transfer of the right of control from the originally designated controlling party to a new controlling party. The following discussion concerns the above three issues.

3.1 When no negotiable transport document or no negotiable electronic transport record is issued⁴⁶

3.1.1 Who is the controlling party?

When no negotiable transport document or no negotiable electronic transport record is issued, “the shipper is the controlling party unless the shipper [and the consignee agree that another person is to be the controlling party and the shipper so notifies the carrier, the shipper and consignee may agree that the consignee is the controlling party] [designates the consignee or another person as the controlling party]”,⁴⁷.

3.1.1.1 Rationale for shipper to be *prima facie* controlling party

Article 56.1 (a) defines that the shipper is *prima facie* the controlling party when no negotiable transport documents or negotiable electronic transport record is issued. The reasons which stand for this route both in a commercial sense and that of legality include the following:

⁴⁶ There are two situations: one of them is that the non-negotiable transport or record is issued, the other is that none transport document or record is issued at all.

⁴⁷ See the article 56 (1) (a).

One is that the shipper, as may be the seller of the underlying contract of sale, needs this control of goods as long as the goods are in the custody of the carrier. By way of example, not uncommon could instructions be given to the carrier in respect of climate or temperature conditioned goods during the transit that these should not be delivered before a certain point in time or before the goods have reached a certain condition.⁴⁸ Again, a carrier may also receive an instruction from the shipper not to deliver the goods before the carrier has received the consent thereto from a third party (e.g. a bank). These instructions run parallel with certain corresponding rights or obligations of the seller under the contract sale.

The *prima facie* rule in the article 56.1 (a) also complies with the general principle that a contract by which A promises B to render some performance to C may, on its true construction, be one to perform in favor of C or as B may direct.⁴⁹ A contract of carriage can readily be construed as one by which the carrier undertook to deliver to the named consignee (the buyer) or to such other person as the shipper might direct.⁵⁰ The shipper, *ab initio* on the terms of the contract of carriage, may have the right to change his purpose at any rate before the delivery of the goods to the party named in the transport documents or records, and may order the delivery to some other person. The provision in the article 56.1 (a) has the same effect.

3.1.1.2 Does the designation of a new controlling party need the consent of the consignee?

The article 56.1 (a) further provides the conditions for designation of a controlling party other than the shipper. The present draft of these, which are placed in two separate square brackets in the article 56.1 (a), points to the opposite directions: One merely states that the shipper can unilaterally so designate a new controlling party. The other requires the consent of the consignee even if the consignee was not a party to the contract of carriage.

The requirement for the consent of the consignee in the article 56.1 (a) was explained in the paragraph 105 of the UN Document A/CN.9/526⁵¹, notably:

“It was observed that the consignee was not a party to the contract of carriage. It was also observed that if the contract provided for the shipper to be the controlling party, subparagraph (ii) [i.e. the article 56.1 (b)] conferred to him the power to unilaterally transfer his right of

⁴⁸ This is the right of control which does not constitute a variation of the contract of carriage defined in the article 54 (a).

⁴⁹ See *Tradigrain S.A. v King Diamond Mines Ltd (The Spiros C)* [2000] 2 Lloyd's Rep. 319 at 331.

⁵⁰ See *Elder Dempster Lines v Zaki Ishag (The Lycaon)* [1983] 2 Lloyd's Rep. 548.

⁵¹ <<http://daccessdds.un.org/doc/UNDOC/GEN/V03/839/78/PDF/V0383978.pdf?OpenElement>> (Last accessed on

control to another person. In response, a view was expressed that the designation of the controlling party took place at a very early stage in the carriage process or even before the conclusion of the contract of carriage. At that stage, designating the controlling party might be an important point for the purposes of the underlying sale transaction that took place between the shipper and the consignee. For that reason, it was considered appropriate under that view to involve the consignee in the designation of the controlling party.’’

I do not agree with the solution and the view in favor of it, on the basis of the following issues:

Firstly, as the shipper is the *prima facie* controlling party, the designation of a third person to be the new controlling party is effective as between shipper and carrier, even though it may amount to a breach of contract between shipper and originally named consignee, e.g. where the goods were shipped for the purpose of performing a contract of sale between these parties.⁵² The consent of the consignee seems not necessary since the originally named consignee could get contractual remedies from the shipper according to the contract of sale.

Secondly, the consent of the consignee provided for in article 56.1 (a) can hardly be carried out. The designation of the controlling party other than the shipper could take effect only if the carrier had been notified of the fact *by the shipper* that the right of control had been transferred from the shipper to the consignee or a third person. But the notice from the shipper would not of itself provide the carrier with any means of knowing that the consignee had been consented to have a third person to be the controlling party.

Last but not least, the shipper’s right to redirect the goods to someone else (either the originally named consignee or a third party) may be compared with the “right of disposition” (or “disposal”) or the “right to modify the contract of carriage” which is given to a consignor under the conventions which regulate international carriage of goods by air, road and rail.⁵³ None of the conventions provided that the consent of the original consignee is necessary for the person other than the shipper to be the one who has such rights. The CMR⁵⁴ affords a good example of the rules in this respect. According to the article 12.1 of the CMR, the sender has the

18 August 2006).

⁵² See Sir Guenter Treitel and F.M.B. Reynolds, *Carver on Bills of Lading* (London: Sweet & Maxwell, 2005), 1-019 at p.16.

⁵³ See Sir Guenter Treitel and F.M.B. Reynolds, *Carver on Bills of Lading* (London: Sweet & Maxwell, 2005), 1-012 at p.10.

⁵⁴ Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956).

exclusive right of disposal of goods. The original named consignee can be protected by receiving the second copy of the consignment note or asking delivery of goods upon which time the right of the sender ceases to exist.⁵⁵

3.1.1.3 When is the consignee the controlling party?

The question when the consignee is the controlling party depends on the terms and on the true construction of the contract of carriage. Theoretically, if the contract negatives the right of control of the shipper, e.g. by conferring such a right exclusively on the consignee, then the latter is the controlling party.⁵⁶ In practice, this can be fulfilled by the notice from the shipper to the carrier.

Moreover, article 55.2 provides that any variation to the contract of carriage, including those referred to in the article 54 (b) and (c), upon becoming effective, must be stated in the [negotiable] transport document or incorporated in the [negotiable] electronic transport record and be initialled or signed in accordance with the article 39. This provision is made “as desirable to ensure that amendments to the contract of carriage are signed or, at least initialled, as is the current practice”⁵⁷. If the word negotiable in the square brackets is to be deleted, the agreement between the shipper and the carrier that the consignee is the controlling party can only take effect when it is made an entry in the non-negotiable transport document or electronic records. Question arises in relation to the situation where no transport document or electronic record is issued at all. In the case of that, only the shipper could be the effective controlling party.

3.1.2 Proper identification needed for exercising right of control

When the controlling party exercises the right of control in accordance with article 54, it must, by virtue of the article 56.1 (c) produce proper identification. This is an obligation of the controlling party to exercise its rights, which could facilitate the carrier to identify the right party. The article 56.1 (c) is irrelevant to the designation of the controlling party.

⁵⁵ See the article 12.2 of the CMR.

⁵⁶ See the article 56.1 (a) on UN Document A/CN.9/WG.III/WP.56

⁵⁷ See UN Document A/CN.9/WG.III/WP.56, fn.187 at p.45.

3.1.3 Rule for transfer of right of control

The controlling party, pursuant to the article 56.1 (b), is entitled to transfer the right of control to another person, upon which transfer the transferor loses its right of control.

The draft convention provides in this article that the carrier must be notified such transfer by the transferor or the transferee if applicable law permits. As is mentioned in the section 3.3.1.3, the transfer of right of control to another person must be entered in the transport documents or electronic records.

3.1.4 Limits to exercise right of control

Limits on the controlling party's right of control depend on three factors: the terms of the contract between shipper and carrier; the period for exercise the right of control; and the acquisition of rights by the consignee.

3.1.4.1 Terms of contract between shipper and carrier

When the controlling party exercise the right of control over goods, instructions give to the carrier which constitutes “‘minor, normal’ and substantive modification”⁵⁸ of the contract are limited to the categories listed in the article 54. No other instructions that vary the terms of the contract can be executed by the carrier. Furthermore, the controlling party's exercise of the right of control cannot prejudice the interest of the carrier, otherwise the carrier is under no obligation to execute the instruction.⁵⁹

3.1.4.2 Period for exercise the right of control

The controlling party remains in control of the goods until their final delivery. In the present draft context, the paragraph 1 (d) of the article 56 has been added to set up the time until which the right of control can be exercised in case of non-negotiable transport document or electronic transport record is issued. The article 56.1 (d) states:

“The right of control [terminates] [is transferred to the consignee] when the goods have arrived at destination and the consignee has requested delivery of the goods.”

⁵⁸ UN Document A/CN.9/WG.III/WP.56.

⁵⁹ See the article 57.1.

As commented in the UN Document A/CN/WG.III/WP.56⁶⁰, this could trigger that the common shipper's instruction to the carrier not to deliver the goods before it had received the confirmation from the shipper that payment of the goods had been effected could be frustrated. However, the right of control is defined in the article 54 as a right to give the carrier instructions during the period of responsibility as set out under the article 11. It seems to me the termination of the right of control in fact means the controlling party can no longer give instruction to the carrier according to the article 54, whereas the effect of the instruction which has been executed by the carrier does not vanish of itself by this termination. Thus, the article 56.1 (d) does not diminish the controlling party's rights. There is similar provision in the CMR.⁶¹

There is another view over this issue. It has been considered that since the right of control need to be exercised during the period of responsibility of the carrier defined in the article 11.1, it may be unnecessary to state when the right of control ends.⁶² However, the provisions in the convention are quite complicated. The period of responsibility of the carrier also needs to be determined on each specific case. Therefore, it seems to me that an explicit point of time probably is the better route.

3.1.4.3 Acquisition of rights by consignee

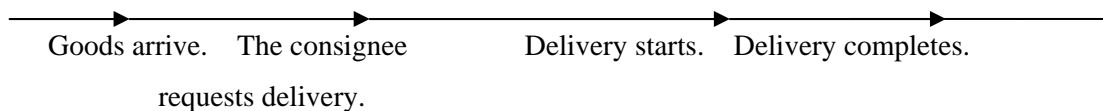
It is noteworthy that, pursuant to the article 56.1 (d) it is not sufficient for the right of control to terminate or be transferred to the consignee if the goods have arrived at destination. The controlling party will lose the right of control only when the consignee has requested delivery of the arrived goods. In fact, this point of time is different from that of the carrier's discharge of his obligation by delivery of the goods to the consignee.⁶³ The carrier's responsibility generally lasts until the time when the goods are delivered to the consignee. The request of the consignee however, is normally forwarded to the carrier before the start of the delivery. Thus, if there was no article 56.1 (d), the controlling party could exercise its right of control after the goods arrived at destination and before the carrier complete the delivery of goods to the consignee. This can be illustrated by a picture that shows the different points of time mentioned above.

⁶⁰ See UN Document A/CN/WG.III/WP.56, fn.190 at p. 45

⁶¹ The article 12 of the CMR provides that "this right [the right of disposal] shall cease to exist when the second copy of the consignment note is handed to the consignee or when the consignee exercise his right under article 13, paragraph1 ...".

⁶² See UN Document A/CN.9/WG.III/WP.56, fn.190 at p.45.

⁶³ The article 11.1 reads: " Subject to article 12, the responsibility of the carrier for the goods under this Convention covers the period from the time when the carrier or a performing party has received the goods for carriage until the



It seems to me that the “consignee’s request”-criterion is more sensible. On the one side, the consignee’s interest could be protected to the most extent. On the other side, it is easier for the carrier to follow the instruction, since the carrier will be in a dilemma when it faces controlling party’s instruction and consignee’s request of delivery of goods.

3.2 When negotiable transport documents are issued

3.2.1 Who is the controlling party in case of a negotiable transport document is issued?

It is provided for in the article 56.2 (a) that when a negotiable transport document is issued, “the holder or, in the event that more than one original of the negotiable transport document is issued, the holder of all originals is the sole controlling party”.

Although the discussion on the definition of the negotiable transport document is out of the scope of this thesis, it is necessary to mention here that the draft convention provides that a negotiable transport document is a transport document with certain formality indicating its negotiability and must be recognized by the governing law to effect as such.⁶⁴

3.2.1.1 Holder of negotiable transport document

The “holder of a negotiable transport document” is defined in the article 1 (j) (i). It states:

[“Holder” means] a person that is for the time being in possession of a negotiable transport document and

(a) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or

time when the goods are delivered to the consignee.”

⁶⁴ The article 1 (o) states: “ ‘Negotiable transport document’ means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

(b) if the document is a blank endorsed order document or bearer document, is the bearer thereof....

It is obvious that the holders must be lawful holders of the transport documents. This excludes cases in which the document was obtained by fraud. But the persons that are qualified as the holders are not limited to shippers, consignees and persons who take the document in good faith and for value. It can also be a pledgee where a negotiable transport document lawfully obtained was retained in breach of contract.

3.2.1.2 Shipper and seller not to be the same person

There is a possibility that the buyer of goods enters a contract of carriage with carrier, where goods is sold then resold and a bill of lading in the name of and to the order of the sub-buyer is issued to the buyer. In this case, the seller is the consignor⁶⁵ that delivers the goods to the carrier. But it is not the holder of the negotiable transport document according to the provision in the article 56.2 (a), although it might be in the possession of the document. It can only rely on the stoppage in *transitu* to redirect the goods where the buyer is in breach of the contract of sale.⁶⁶ But before the bill of lading is transferred to the buyer, it can hardly be decided that who the controlling party is. Furthermore, when the buyer possessed the bill of lading, it becomes the controlling party according to the article 56.2 (a). But as long as the bill of lading is not transferred to the sub-buyer who is a third party that took the bill in good faith, the seller's right of stoppage in *transitu* still exists. Then both the seller and the buyer have the rights to give instructions to the carrier, which makes the carrier again in a dilemma situation to execute those instructions.

3.2.1.3 Charterer and shipper not to be same person

Similar situation could also arise where the carriage operation is governed by more than one contract: e.g. where A's ship is chartered by B and a bill of lading covering goods shipped in that ship is issued or transferred to C, so as to constitute a contract between A and C.⁶⁷ If C

⁶⁵ See the article 1 (i).

⁶⁶ This right of stoppage could not be asserted against a bona fide transferee. See the section 307 of the Norwegian Maritime Code 1994; *Fuentes v Montis* (1868) L.R. 3 C.P.268 at 276.

⁶⁷ See Sir Guenter Treitel and F.M.B. Reynolds, *Carver on Bill of Lading* (London: Sweet & Maxwell, 2005), 1-013 at p. 11.

becomes the holder of the bill of lading for the purpose of the draft convention, both B and C have right to redirect the goods: B's right arise from the charterparty, whereas C has the right of control under the contract of carriage.

3.2.1.4 Solutions to the conflicts where the carrier will not wish to resolve them in favor of either in case it is liable to the other

One possible solution which was canvassed was to give express protection in implementing the draft convention to carriers who make delivery in accordance with the controlling party's instructions, where the draft convention conflict with other conventions, the draft convention should prevail being specifically designed to regulate the relations arising out of the contract of carriage. The view of the law commission and the Scottish law commission is that "on balance, we have decided not to make express provision of this kind, since it would merely purport to replicate a contractual provision which the parties would be free to make"⁶⁸. If the carriage contract provides the carrier with a defence against the controlling party in cases where the carrier has taken all reasonable steps to deliver to the named consignee or otherwise in accordance with the controlling party's instructions, the carrier would have such a defence in any action by a third party, since the third party's rights of suit are on the terms of the contract of carriage. If the carriage contract does not provide such a defence, the law commission and the Scottish law commission disagree that "there are compelling reasons why the legislature should re-allocate an agreed risk by providing such a defence instead."⁶⁹

3.2.1.5 The holder of all originals to be the sole controlling party

In general, bills of lading are issued in of from three to six originals and that delivery of the cargo can be required against the presentation of a single original from such a set. On the contrary, the article 56.2 (a) provides that the holder of all originals is the sole controlling party in the event that more than one original of the negotiable transport document is issued.

It seems to me that this provision attempts to alleviate the burden of the carrier due to the draft convention's empowering the right of control on the controlling party. Where the documentary credit is used, the rule is not difficult to be followed, since the seller always need the whole set of originals to demand the payment of the goods from the bank.

⁶⁸ See The Law Commission and The Scottish Law Commission, *Right of Suit in Respect of Carriage of Goods by Sea*.

3.2.2 Transfer of right of control in case of negotiable transport document issued

The holder is, according to the article 56.2 (b), “entitled to transfer the right of control by passing the negotiable transport document to another person in accordance with the article 61, upon which transfer the transferor loses its right of control.”

This article further stipulates that “if more than one original of that document was issued, all originals must be passed in order to effect a transfer of the right of control”.

3.2.2.1 Negotiable transport document as transfer mechanism

Where the negotiable transport document is issued, the transfer of right of control is linked with the transfer of the document which is dealt with in the article 61.1.

The article 61 states:

“1. If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such document by transferring such document to another person:

- (a) If an order document, duly endorsed either to such other person or in blank, or,
- (b) If a bearer document or a blank endorsed document, without endorsement, or,
- (c) If a document made out to the order of a named person and the transfer is between the first holder and such named person, without endorsement.”

It is not very clear that whether the right of control can be deemed as one of the rights “incorporated in the negotiable transport document” which is referred to in the article 61.1. But for the purpose of the article 56.2 (b), it is sufficient to know that how the negotiable transport document can be transferred.

3.2.2.2 Transferor to lose right of control upon transfer of document

Upon the transfer of the negotiable transport document, the transferor loses its right of control over goods.⁷⁰

⁶⁹ See footnote 68 above.

⁷⁰ See the article 56.2 (b) on UN Document A/CN.9/WG.III/WP.56..

3.2.2.3 All originals to be needed for transfer of right of control

From Para.190 in A/CN.9/WG.III/WP.21 This comment originated from Para.190 in A/CN.9/WG.III/WP.21, the original text is: A complication may arise if the negotiable document has been issued in more than one original. The provision follows the current practice that only holding the full set of originals entitles the holder to exercise the right of control. The consequence is that, if a person has parted with one (or more) originals and has kept one or more other originals, nobody is in control of the goods.

3.2.2.4 Requirement for exercise right of control in case of a negotiable transport document is issued

According to article 56.2(c), if the carrier requires the negotiable transport document, the holder of the negotiable transport document, namely the controlling party must produce the document requested by the carrier, for the purpose of exercise right of control. If more than one original of the document was issued, the controlling party must produce all original documents for exercising the right of control. Otherwise, the carrier can refuse to execute instructions sent from the controlling party.⁷¹

3.3 The Applicable rules when a negotiable electronic transport records is issued

Article 56.3 deals with the situation where a negotiable electronic transport record is issued. According to it, the holder is the sole controlling party and has the right to transfer the right of control under the procedures referred in the article 6⁷². The transferor upon the transfer loses its right.⁷³

Negotiable electronic transport record is the electronic equivalent of the negotiable transport document such as bill of lading, which has same functions: 1) as receipt for goods shipped; 2) as evidence of the contract of carriage; 3) as a document of title, including the transfer of the contractual rights.

Right of control is a contractual right despite a mandatory right, which could be transferred to different holders of negotiable transport documents. This is to say that, the right of control can be transferred in holders of negotiable electronic transport record as well.

⁷¹ See the article 56.2 (c) on UN Document A/CN.9/WG.III/WP.56.

⁷² The detailed procedure of electronic transport document is in article 6 in A/CN.9/WG.III/WP.56

⁷³ See further in article 56(3) in A/CN.9/WG.III/WP.56

However, no electronic transport document system has yet been adopted worldwide, and the tried system has differed in nature. Those made practical obstacles to operation of electronic transport documents. Even though there are a number of rules that support the use of electronic transport document, including draft convention, there is still a lack of international confidence in the use of electronic transport documents. This is because one of the distinguishing features of international trade is that a large number of parties may be involved in a single shipment of goods. In addition to the buyer and the seller, contracts of carriage can easily involve several banks in different countries, insurance companies, carriers, forwarders, ports and customs authorities. Each of these parties may have a documentary requirement so that it is particularly difficult to devise a comprehensive electronic transport documents system. In the draft convention, no relative regulations can get rid of the obstacles listed above. Thus, particular attention needs to be given to the future work UNCITRAL working group III, which could bring legal support to the new methods being developed in the field of electronic transfer of right.

3.4 The protection of “intermediate holder”

An exception rule is designated in the article 56.4 for the “intermediate holder”. There is not the shipper or the person referred to in article 34⁷⁴, can discharge from the liabilities which imposed on the controlling party if he transferred the right of control without having exercised the right.

From this article it can be seen, the person who transferred the right of control but having exercised the right is seemed to be an ‘intermediate holder’ in practice, especially in bill of lading practice.

This provision complies with a general perception in the banking industry. It is not thought that a provision of this kind is statutory law in any country; however, it belongs to the functional realities of bill of lading practice. To protect the position of innocent holder of the bill of lading, this rule is necessary.

It should be noted that, this provision does not exclude that, outside the contract of carriage, any liability may arise between the intermediate holder and the carrier.⁷⁵

⁷⁴ The person who identified as ‘shipper’ in contract, no matter complies with the definition of ‘shipper’. See further in Article 34 in A/CN.9/WG.III/WP.56

⁷⁵ For example: if the carrier acts as a *negotiorum gestor* on account of the party interested in the goods.

4 Carrier's Execution of Instruction

The controlling party's exercise of the right of control is based on the carrier's execution of its instructions. To what extent the carrier is bound to exercise the controlling party's instructions? What is the consequence for the execution and non-execution? These questions are dealt with in the article 57.1 and 4 of the draft convention. The following discussion concerns the pro and con of rules in respect of the two questions attempt to be solved in the article 57.

4.1 Conditions for the execution of instructions

There are two variants for the draft article 57 (1) which provides the conditions under which the carrier's bound to execute the instructions from the controlling party.

4.1.1 Variant A of paragraph 1, including para.1 *bis*

4.1.1.1 Instructions needed to be executed in Variant A⁷⁶

According to Variant A of paragraph 1, the carrier must execute instruction when it:

Can reasonably be executed according to its terms at the moment that the instruction reaches the person to perform it

Will not interfere with the normal operations of the carrier or a performing party; and would not cause any additional expense, loss, or damage to the carrier, the performing party, or any person interested in other goods carried on the same voyage.

From above content it can be seen that a carrier is deemed to have agreed with these kinds of instruction when he concluded the contract of carriage with the shipper.

The subparagraph (a) of variant A emphasizes the instruction can "reasonably be executed" when performing. It means that the instruction must be "performed in a reasonable manner and

⁷⁶ The first sentence of variant A is 'subject to paragraph 1 *bis*, 2 and 3, the carrier must execute any instruction referred to in article 54', as set out in footnote 195 in A/CN.9/WG.III/WP.56, the paragraph 1 *bis* is a substitution of para 1, without any substantive change.

with reasonable diligence on each side”⁷⁷. The following examples are taken to make a comparison between the charterer’s instructions under a charterparty and the controlling party’s right of control under a contract for carriage of goods by sea.

Under a charterparty, if the charterer designated the shipowner to deliver goods in an intermediate port, the controlling party must guarantee the nominated intermediate port is a safe port to arrive at that moment. Otherwise, the carrier can refuse to execute the instruction, for it cannot ‘reasonably be executed’. In contract, according to the provisions in the draft convention, the manner or place to give an instruction, or the time at which or within which the instruction is to be given, is left open. This is a normal legislative mode for drafting the international conventions where consideration must be had for the harmonization of different national laws, trans-national laws and trading customs. Moreover, the principle of freedom of contract is gradually dominating the contract of carriage instead of mandatory rules. Therefore, it is better to be determined by contract articles that what is reasonable, having regard to the circumstances of the particular case⁷⁸. Hence, the rules in this respect are not necessarily to be uniform.

The subparagraph (b) of Variant A concerns the instruction which is “not interfere with the normal operations of the carrier or a performing party”. A typical situation complies with this article is the liner trade. The liner trade characteristically is “operated by the owner (carrier) giving notice that the ship will sail regularly between certain ports and will transport goods in return for freight, which is earned once the cargo reaches its destination”⁷⁹. Each voyage will normally provide transportation services for many different parties. This makes it necessary for the cargo owners’ (suppose he is the controlling party for simplifying the situation) rights and obligations to be set out clearly right from the start, so that the shipping line knows, such as, to which port the cargo is to be delivered. In this case, the shipowner seldom will execute the instruction sent by one controlling party, for instance, deliver goods in an intermediate port other than the port of shipment or port of original destination. If the shipowner did so, it probably leads to deliver other cargo delay and breach contracts between the shipowner and other cargo owners. This instruction is the kind “will interfere with the normal operation of the carrier or a performing party”, so that carrier has a right to refuse execution on basis of interfering with the normal operation.

⁷⁷This is a explanation of ‘reasonable performance’ in Carver Carriage of Goods by Sea. See P898, Raoul Colinvaux, *Carver Carriage of Goods by Sea*, the thirteen edition.

⁷⁸ See *per* Lord Watson in *Dahl v. Nelson* (1881) 6 A.C.38,59

The subparagraph (c) of variant A means that the carrier can refuse to execute the instruction which may damage or cause additional costs to the carrier. This is a general provision which should be applicable to any instruction given to the carrier during a voyage, since other transport conventions include comparable provisions⁸⁰. In fact, the subparagraph (c) is the very reason that some of the drafters support variant A⁸¹, in so far as this article is a safeguard for the carrier.

4.1.1.2 Comments on Variant A

Variant A is the reflection of views and suggestions in previous conferences⁸². There was a discussion in terms of the nature of the carrier's obligation in this article. Whether the carrier should be under an obligation to perform or under a less stringent obligation to undertake its best efforts to execute the instructions received from the controlling party? Take the same example in 4.1.1.1, under voyage charter party, in case of carrier decided to execute the instruction with the intermediate port is not safely to get to, if the nature of carrier's obligation is former, it cannot be deemed to perform obligation even the carrier choose a near port to discharge goods. In opposite, if the nature of carrier's obligation belongs to latter one, the action to choose a near port to discharge goods which taken by carrier can be deemed to perform his obligation.

A view expressed by most delegations preferred the former one, namely the more stringent obligation.⁸³ However, if so, carrier will prefer to refuse any instruction which may create extensive uncertainties in aim to avoid the risk of failure to perform. What's more, liabilities imposed on carrier between failure to perform and non-performance is not explicit. For the two reasons, the carrier may decline instructions not flawless other than undertake reasonable efforts to perform. Then the right of control will become a mere scrap of paper without any substantial content.

Subparagraph (c) is being seemed as an article which has substantive difference distinguished with variant B⁸⁴. But a question was raised regarding the relationship between

⁷⁹ See P284, *Introduction to maritime law*, the second edition.

⁸⁰ See article 7 of CMR,

⁸¹ See further in Para 47 in A/CN.9/594

⁸² See para 114 to 116 in A/CN.9/ WP.526

⁸³ The original expression in para.116 in A/CN.9/ WP.526 is: the view was expressed that the former, more stringent obligation, should be preferred.

⁸⁴ See details in para.46 in A/CN.9/ WP.594

subparagraph (c) and article 54. Under article 54, the exercise of the right of control would inevitably involve “additional expenses”. However, such expenses resulting from delivery of the goods before their arrival at the place of destination might range from acceptable expense to less acceptable expense from the perspective of the carrier, for example, if the instructions received from the controlling party resulted in a changed provisions, the carrier should be “under no obligation to execute the instruction or should limit the obligation of the carrier to execute to cases where the instruction would not cause ‘significant’ additional expenses”⁸⁵. As the same problem with subparagraph (a) above, the scope of additional expenses is not being defined specifically. Without a proper limit, it is difficult in practice to implement article 54 (a) (b) and (c).

4.1.2 Variant B of article 57.1

As aforesaid, Variant A has invoked a lots of discussions. After those discussions, many valuable and practical views and suggestions have been produced and agreed generally. It was agreed that the Variant A needs to be revised or deleted and replaced by a new structure of the paragraph should address. The views and suggestions are mainly concentrated on two aspects: the first is the circumstances under which the carrier should follow the instructions received from the controlling party; the other one is the consequences of execution or non-execution of such instructions⁸⁶. In this case, Variant B, a revised and improved draft, which adopted some views and suggestions are being listed in draft convention as a possible variant.

4.1.2.1 The instructions which carrier is bound to execute

In accordance with variant B paragraph 1, the carrier is bound to execute the instructions when if:

The person giving such instructions is entitled to exercise the right of control;

The instructions can reasonably be executed according to their terms at the moment they reach the carrier, and

The instructions will not interfere with the normal operations of the carrier of a performing party.

⁸⁵ As set out in foot note 197 of A/CN.9/WG.III/WP.56, the Working Group has mentioned this problem, and broad expressions support to delete article (c).

It is not difficult to see that the subparagraph (a) is a reflection of the first aspect mentioned in 4.1.2. The two principles in the relationship of right of control are carrier and controlling party, the carrier has obligation to perform instructions received only from controlling party, namely the person is “entitled to exercise the right of control”, regardless the instructions sent by shipper, consignee or another person and so on.

In my opinion, it is an improvement compared with subparagraph(a) of Variant A, especially take into consideration in conjunction with para.1, the drafting words were changed from “the carrier must execute” in variant A to “the carrier is bound to” in variant B. It is obvious that the former words imposed more stringent and absolute obligations to carrier than the latter one. In variant A, the carrier not only has to execute “any instructions” but also identifies the party who sent instructions is entitled or not. In comparison, the words adopted by variant B are milder so that remains a flexible space to carrier.

The subparagraph (b) is akin to subparagraph(a) of variant A to a great extent. The only difference between two articles is that obligators has been changed from “the person to perform it” in subparagraph (a) of Variant A to “carrier” in subparagraph (b) of Variant B. The carrier which is defined at the article 1 (d)⁸⁷ is the person that enters into a contract of carriage with a shipper. He is the party to the contract of carriage. “The person to perform” in subparagraph (a) of Variant A should be deemed as those who can physically perform the carrier’s responsibilities under a contract of carriage, including carrier and performing party⁸⁸.

Probably the reason for narrowing down the scope of obligators is that carrier is the sole obligator under the contract to execution of the right of control. The “performing party means a person other than the carrier that physically performs or undertakes to perform any of the carrier’s responsibilities under a contract of carriage...”⁸⁹ But for the consistency and unity of the draft convention, in my opinion, it is better to keep the term that “the person to perform”, for both the carrier and the performing party have the obligation to obey the instructions.

As aforesaid, the subparagraph (c) is the only one kept the same in Variant B, which is agreed in general. A revised suggestion invoked by the European shipper’s council on it states that the word “interfere” in subparagraph (c) of Variant B should be qualified by the addition of

⁸⁶ The two aspects are summerized by Working Group III of UNCITRAL in para.117 of A/CN.9/526

⁸⁷ See. UN document A/CN.9/WG.III/WP.56

⁸⁸ See. footnote 90 below.

a word such as “significantly”⁹⁰ to be a counterpart with a revised suggestion of carrier’s obligation in the subparagraph(c) of Variant A.⁹¹

4.1.2.2 Comments on Variant B

Compared with variant A which is based on the original text of draft instrument, the Variant B is the result of the recast by UNCITRAL working group with plentiful views and suggestions on Variant A.

Most of the delegations so far had expressed their preference of variant B⁹², in so far as the more precise drafting words and reasonable structure. In spite of so, it still needs to be revised in some disputed aspects. By the way of example, in the subparagraph(c) of Variant B, the word of “performing party” remains as the subparagraph (b) of variant A⁹³. As afore-analyzed of the subparagraph (b) in 4.1.2.1, it is better to uniform the word in the whole draft convention.

4.2 Consequences of carrier’s failure to comply with new instructions from controlling party

Article 57.4 concerns the carrier’s liability for “loss or damage to the goods resulting from its failure to comply with the instructions of the controlling party which is in breach of its obligation”⁹⁴ under article 57.1.

4.2.1 Does the article 57.4 add extra burden on the carrier?

This is a new problem arising from the rules of “right of control” which means the provision could add extra burden on the carrier than those have existed under the current liability regimes.

In the traditional sphere of carriage of goods by sea, the carrier’s obligations and liabilities for loss or damages during his period of responsibility had been listed in the carriage contract. Under the draft convention regime with right of control, the new instructions received from controlling party will impose more obligations and liabilities following, without predictability. In accordance with article 57.4, the carrier not only has to identify the qualification of controlling party, but also considers reasonableness of instructions and the expense to execute.

⁸⁹ See article(1) (e) in A/CN.9/WG.III/WP.56

⁹⁰ See footnote 85 above.

⁹¹ See. UN document A/CN.9/WG.III/WP.64, para.59.

⁹² See. UN document A/CN.9/WP.64, para.58 and UN document A/CN.9/594, para.47.

⁹³ This problem has also been mentioned in A/CN.9/594, para.48.

⁹⁴ See detail in article 57 (4) in A/CN.9/WG.III/WP.56

Besides these, the carrier is liable for the loss or damage when it fails to comply with the instructions at risk. In so far as lacking predictability, performing new instructions may suffer heavy weather or delivery delay⁹⁵, which is the cause that leads to loss or damage. Thus, compared to previous international conventions regime, the carrier under draft convention has to bear more burdens during the period of carriage.

4.2.2 Basis of liability

The article 17 in draft convention is regarding the carrier's liability, which demonstrated that the carrier is liable for loss of or damage to the goods as well as for delay in delivery only when the claimant can prove the fault of carrier. This article must be interpreted that the carrier's liability under draft convention is on the basis of negligence. The claimant has to bear the burden of proof. In contrast, in case of failure to execute the instruction, the carrier should bear strict liability⁹⁶, the only excuse is the instruction is not bound to the carrier according to the article 57.1 bis:

If it is reasonable expected that one or more of the conditions referred to in subparagraph (a) (b) and (c) is not satisfied, then the carrier is under no obligation to execute the instructions.

Seen from above that if the conditions in article 57.1 can not be satisfied, the carrier will be exempted. And the burden of proof is on the carrier, namely the carrier has to prove the new instructions sent by the controlling party is out of the scope of right of control, which difficult to carry out.

4.2.3 Can the carrier rely on the article 57.1 to defend its failure to execute the instruction?

Problem could arise where if the carrier failed to execute the instruction in performing his obligation, can the carrier rely on the article 57.1 to defend its failure to execute the instruction? The draft convention does not provide a solution to this question, which might be in the scope of consideration.

⁹⁵ Delay is possible to happen especially in changing delivery port.

⁹⁶ See article 57.4 in UN Document A/CN.9/WG.III/WP.56.

4.3 Deemed delivery upon which carrier discharges his obligation

The article 58 regards deemed delivery, which has been approved by UNCITRAL working group III without divergences.⁹⁷ It states that:

“Goods that are delivered pursuant to an instruction in accordance with article 54 (b) are deemed to be delivered at the place of destination and the provisions of chapter 10 relating to such delivery are applicable to such goods.”

Generally speaking, where the controlling party exercises its right of control, the carrier would discharge cargo in a nominated port according to the instruction, meanwhile the controlling party must be ready to receive cargo or arrange proper person to receive cargo.

However, the carrying out of the instructions may result in a delivery of the goods otherwise than originally intended. For avoidance of doubt, it seems useful to provide that the general provisions relating to the delivery are applicable to such extraordinary delivery as well.

Thus according to the article 58, the carrier's responsibility ceases at the point of deemed delivery, by an appropriated-worded provision in the carriage contract, the carrier is also relieved from having to actually hand over the goods to the custody of the consignee (or his agent).

It should be noted that in case of deemed delivery, the freight fee should be paid according to the original contract, without affected by different distance between different delivery ports. In addition, according to article 57, the controlling party has to bear the additional expense produced by executing instruction.

In my point of view, the article 58 is in favour of carrier to reduce its burden when execute the new instructions such as changing a new port to deliver cargo. Since the right of control imposed a greater obligation to carrier, it is fair to add a reverse regulation to achieve a better balance between carrier and controlling party.

⁹⁷ See. UN document A/CN.594, para.59.

5 The Controlling Party's Obligations and Liabilities

This chapter examines the obligations and liabilities of the controlling party, which are stipulated in the article 57.2, 57.3 and 59. The article 57.2 is in relation to the controlling party's obligation of reimbursing the carrier the additional expense incurred by executing the new instructions. According to the article 57.3, the controlling party is obliged to provide a security upon the request of carrier in certain conditions. In addition, by virtue of the article 59, the controlling party ought to provide information, instructions or documents in case of carrier's reasonable requirement.

Besides, there are some extra relative liabilities imposed on the controlling party in respect of delivery in the article 48, 49, which will be analyzed in 5.2.

5.1 The controlling party's basic obligations and liabilities.

5.1.1 "Reimbursement obligation" provided for in the article 57.2.

As commented in the section 4.1.1.2, the exercise of the right of control stated in article 54 would inevitably involve "additional expenses". On the ground of fairness, the controlling party must reimburse the additional expense to any parties⁹⁸ subjected to the expense on the voyage in any event. This is the rationale of the article 57.2.

By virtue of article 57.2, the controlling party must reimburse any additional expense spent in the execution of controlling party's new instructions. For example the extra bunker consumed in case of changing delivery destination. Additionally, if any loss or damage caused by the execution of new instructions, the controlling party is liable to indemnify the damaging party, including "the carrier, the performing parties and any persons interested in other goods carried on the same voyage or journey"⁹⁹. Again in liner service, the other cargoes on the same voyage may suffer loss or damage during carrier's the instruction from the controlling party of one

⁹⁸ Any parties include the carrier, performing party and any persons interested in other goods carried on the same voyage. See details in the article 57(2) in UN Document A/CN.9/WG.III/WP.56.

⁹⁹ See article 57(2) in UN Document A/CN.9/WG.III/WP.56.

cargo. If so, the controlling party who sends instructions is liable for the loss or damage and must indemnify other persons interested in the damaged cargoes.

In the former example, no loss or damage incurred by the execution of new instructions, i.e. the controlling party has no liability to the expense, only an obligation to pay because of the execution of its right. However, in the second example, execution of instructions from the controlling party is the causation leads to loss or damage. Therefore, the controlling party must bear the liability to indemnify. The essential of above two types of expense which the controlling party may suffer are different, and that is the reason why the notion of “indemnify” used in the previous draft article 55.2 has been replaced by the notion of “reimburse” in the present draft, because some delegates suggested that the “indemnity” means “the controlling party might be exposed to liability”¹⁰⁰, which can not include the expense incurred upon performing obligations.

5.1.2 Controlling party’s obligation to provide a security in the article 57.3

Pursuant to the article 57.3, the controlling party has to provide a security by the request of carrier for the amount of additional expense or loss or damage. It means that, the controlling party must provide a security by any request of carrier. By avoiding to abuse rights by the carrier, there are two supplementary terms in the square blanket, with respect to the condition of request by the carrier:

Reasonably expects that the execution of an instruction under this the article will cause additional expense, loss or damage; and is nevertheless willing to execute the instruction.

The above two conditions in square blanket are suggestions that will be discussed in the future. However, in my point of view, any request of security should be a right the carrier enjoyed without limits, for the aim of balancing obligations imposed on carrier under right of control. Therefore, the article without conditions could to some extent protect from executing the controlling party’s unreasonable instructions.

No specified regulations of security types in article 59, which means the security can be offered by nature person, legal entities such as bank, or other else. In practice, the most common pattern is bank security. The party who has to provide security normally give a certain amount

¹⁰⁰ See footnote 198 in UN Document A/CN.9/WG.III/WP.56.

property to bank, namely gives the banker a legal title to the goods as pledgee. This amount of property remains with the bank until the controlling party makes reimbursement to carrier. Thus, if the controlling party refuses to pay additional expense induced by its new instructions, the carrier can still receive reimbursement from the bank.

5.1.3 Controlling party's obligation and liabilities to provide information, instructions or documents to carrier according to the article 59.

A safe and successful voyage of the goods may depend to a large extent on the cooperation between the parties. Of primary importance is that the information which the parties reasonably require for the voyage is reliable for that purpose. Because of this, by virtue of article 59, the controlling party has an obligation to provide necessary information, instructions or document to facilitate carrier to execute its instructions.

According to article 59, if the carrier is unable to find the right controlling party or the controlling party is unable to "provide adequate relative information"¹⁰¹, the shipper or the person referred to in the article 34 must bear such an obligation.¹⁰² There is no specified rule about the consequence when the controlling party fails to provide adequate information. If so, in my opinion, the carrier has the right to reject the new instructions.

5.1.3.1 To what extent a relative information is "adequate"?

The draft convention stipulates this duty in the article 30¹⁰³, take the shipper as the controlling party for example:

Shipper's obligation to provide information, instructions and documents

"The shipper shall provide to the carrier [in a timely manner, such accurate and complete] information, instructions, and documents as are reasonably necessary for: "... (b) Compliance with rules, regulations, and other requirements of authorities in connection with the intended carriage, including filings, applications, and licences relating to the goods;"

Subsections (a) of draft the article 30 requires a shipper to provide information regarding the handling of the goods and precautions to be taken. Subsection (c) requires a shipper to provide

¹⁰¹ The analysis of adequate information lies in 5.1.3.1.

¹⁰² See detail in the article 59, the second sentence, UN Document A/CN.9/WG:III/WP.56.

information for the compilation of contract particulars. Unlike subsection (b), a shipper's duty under these other two subsections is qualified by the phrase "unless the shipper may reasonably assume that such information is already known to the carrier." These words are appropriate in the context of the competing private interests of the shipper and the carrier, but government agencies demand accurate information, and nothing can be left to an assumption.

The draft Convention goes further on to deal with a shipper's liability for breach of the duty to give information that the carrier needs to satisfy government requirements. The consensus¹⁰⁴ indicates that the shipper's liability should be based upon fault, except for situations covered by subsection (b) of draft the article 30. Just as carriers are subject to absolute duties of compliance, demanding more than the exercise of reasonable care in providing information, so shippers must accurately and completely provide carriers with the relevant information concerning their goods .

The demand of states for accurate information will increase. One can anticipate that the demand will be presented in a dynamic form, requiring information to be updated as required. The obligation of a shipper to present accurate information to the carrier at the time of tendering the goods will probably be supplemented by a continuing obligation during the transport to provide additional information required by the state. This obligation already exists under regulations pertaining to dangerous goods, where a shipper has an obligation to file a disaster plan with contact information as a resource to deal with the hazards caused by the escape of the goods.

5.2 The controlling party's extra obligations and liabilities when the cargo is undeliverable

The basic obligations and liabilities are regulated in chapter 11, yet as a unified convention, there are parts of extra obligations and liabilities spread out of the scope of chapter 11

5.2.1 The controlling party's extra obligations when no negotiable transport document or negotiable electronic transport record issued.

The article 48 in chapter10 deals with the question to whom the carrier has to deliver the goods and how it can find this person under the case of no negotiable transport document or negotiable electronic transport record issued.

¹⁰³ See UN. Document A/CN.9/WG.III/WP.56.

¹⁰⁴ See UN Report A/CN.9/552,para 131

The starting point is that the contractual counterpart of the carrier, e.g. the contracting shipper, has to advise the carrier about the name of the consignee whom the carrier should deliver. Yet, if no consignee has been referred to in the contract, In accordance with the article 48(a), the controlling party must advise the carrier the consignee prior to or upon the arrival of the goods at the place of destination.¹⁰⁵

Furthermore, in the draft convention it is not provided that a consignee is obliged to take delivery, therefore, what are the legal consequences when the intended consignee does not take delivery?

Normally, the responsibility for the delivery will then rest on the contractual shipper. If the consignee does not show up at the place of destination or otherwise claims to take delivery of the goods, the obligation to release the carrier of the goods remains on the shipper.

Pursuant to the article 48(b) variant C¹⁰⁶, if the consignee does not claim delivery after the goods arrived, the carrier must notify the controlling party, and the controlling party must bear an extra obligation to give a instruction in respect of goods. In the event of the carrier is unable to identify the controlling party after reasonable effort, the shipper will stand in the position of controlling party.

5.2.2 The controlling party's extra obligations when negotiable transport or negotiable electronic transport record is issued

If the carriage is under a negotiable transport document, the situation is much more complicated, which regulated in the article 49.

In case of a negotiable transport document, the first main rule is that its holder has the exclusive right to take delivery of the goods at the place of destination under surrender of the document to the carrier. This rule serves to protect the carrier and means that the carrier will only be discharged from its obligations under the contract of carriage if it delivers the goods to such holder.

But it is quite often that the holder doesn't decline delivery, especially when the holder is a consignee, such as:

(i) The consignee does not take delivery due to a genuine business reason under the sales contract. He may be dissatisfied with a previous shipment of the same goods and, therefore,

¹⁰⁵ See details in the article 48 (a) in UN Document A/CN.9/WG.III/WP.56

¹⁰⁶ There are three variants in the article 48 (b), only take variant c as an example for simplified.

wants to reject them under the sales contract. Or the buyer returns the goods and the seller does not want them either. And it frequently happens that the consignee first has to resell the goods before he is financially able or willing to take up the negotiable transport document from the bank holding that document under a documentary credit or collection and that such resale has failed yet.

(ii) The consignee is not interested in the goods because they have a negative value. They may have such value right from the outset, such as in the case of carriage of rags, , used tyres and disposals. Sometimes, the goods may have acquired a negative value due to events during the carriage, e.g. they become contaminated or otherwise damaged resulting in the need of a costly disposal operation. Or it happens that at the end of the carriage it appears that governmental measures prevent the importation of certain goods.

If the holder does not claim delivery of the goods, as the article 49 (b) referred to, the carrier must notify the controlling party, namely the holder of negotiable transport document, according to article 56.2 (a), to give an instruction regarding the delivery of goods. In the event of the carrier is unable to identify the controlling party or the shipper, the person referred to the article 34¹⁰⁷ will play the role of shipper.

5.2.3 The legal consequences in case of the controlling party fail to give adequate instruction on delivery

The article 50 deals with the failure of the controlling party to give the adequate instruction on delivery. Under this case, the carrier is allowed to exercise his right referred to the article 51, 52 and 53.

Occasionally, it occurs that at the place of destination the carrier is not able or entitled to deliver the goods. The consignee may not show up or takes delivery of the goods while the shipper is not interested either, or the goods may be attached or delivery of them may otherwise be legally prevented. In this type of cases, often the carrier has to do something in order to get rid of the goods.

¹⁰⁷ The original text of The article 34 is: If a person identified as “shipper” in the contract particulars, although not the shipper as defined in paragraph 1(h), [accepts] [receives] [becomes a holder of] the transport document or electronic transport record, then such person is (a) [subject to the responsibilities and liabilities] imposed on the shipper

Generally, this provision follows the provisions in the various national laws on this issue. The carrier should be given a reasonable freedom to act, but always within the limits of reasonableness.

6. Conclusion

The regulations of right of control under the draft convention basically reflect the developing tendency in maritime transport and the highest possibility of compromise among the interests related.

There would be great possibilities to look at sea carriage rules with fresh elements, but it might create more problems than solve them. Further revisions and considerations on some provisions are needed, especially those in relation to the controlling party's exercise of right of control and transfer of right of control, the execution of instructions by carrier etc.

Of course, in spite of reservations as to the draft convention there must be a constructive approach in future debates, compared with the other current international conventions, the proposition of 'right of control' is undoubtedly an advanced of legislation in the draft convention.

References

List of Judgements/Decisions

Judgment of Bowen L.J in *Sanders vs Maclean*. [1883] 11 Q.B.D.327,341)

Tradigrain S.A. v King Diamond Mines Ltd (The Spiros C) [2000] 2 Lloyd's Rep

Elder Dempster Lines v Zaki Ishag (The Lycaon) [1983] 2 Lloyd's Rep.

Secondary Literature

A.G.Guest, *Benjamin's Sale of Goods*, 6th edition.

Bar Associations, *Maritime and Transport Law*, Scandinavian Studies in Law Volume 46

Bryan A.Garner, *Black's Law Dictionary*, 7th edition.

Falkanger, Bull and Brautaset, *Introduction to Maritime law*.

Martin Dockay, *Carriage of Goods by Sea*, 3rd edition.

John F Wilson, *Carriage of Goods by Sea*, 4th edition.

Paul Todd, *Modern Bills of Lading*, 2nd edition.

Raoul Colinvaux, *Carver's Carriage by Sea*, 13th edition.

Simon Baughen, *Shipping Law*, 3rd edition.

Stewart C.Boyd, *Charter parties and Bills of Lading*, 20th edition.

Sze Ping-fat, *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules*

Convention concerning International carriage by rail (9 May 1980)

Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956).

UN Convention on the Carriage of Goods by Sea 1978(The Hamburg Rules)

UN Document A/CN.9/497 – *Transport Law Possible future work on transport law*

UN Document A/CN.9/510 - *Report of the Working Group on Transport Law on the work of its ninth session*

UN Document A/CN.9/526 - *Report of Working Group III (Transport Law) on the work of its eleventh session*

UN Document A/CN.9/WG.III/WP.32 - *Transport Law: Draft instrument on the carriage of goods [wholly or partly] [by sea]*

UN Document A/CN.9/WG.III/WP.50/Rev.1 - Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea] - Right of Control: Information presented by the Norwegian delegation

UN Document A/CN.9/WG.III/WP.56 - *Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea]*

UN Document A/CN.9/WG.III/WP.57 - Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea] - Delivery: Information presented by the delegation of the Netherlands

UN Document A/CN.9/594 - *Report of Working Group III (Transport Law) on the work of its seventeenth session*

UN Document A/CN.9/WG.III/WP.62 - Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] - Transport documents and electronic transport records: Document presented for information by the delegation of the United States of America

UN Document A/CN.9/WG.III/WP.63 - Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] - Delivery to the consignee: Proposal by the delegation of Switzerland on the carrier's right of retention of the goods

UN Document A/CN.9/WG.III/WP.64 - Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] - Comments of the European Shippers' Council regarding the draft convention on the carriage of goods [wholly or partly] [by sea]